



MEMORANDUM

TO: Holiday Display Task Force

FROM: Ingrid Decker, Assistant City Attorney

THROUGH: Steve Roy, City Attorney

DATE: August 21, 2007

RE: First Amendment Issues Related to Holiday Displays on Public Property

I. SUMMARY

When a government such as the City of Fort Collins is deciding what items to include in its own holiday displays on public property one thing it must consider is the First Amendment to the United States Constitution. The First Amendment protects citizens' freedom of speech against excessive government control, and also restricts the extent to which a government can support religious principles or beliefs.

A government-sponsored holiday display is "government speech," meaning that the government can choose the content of its message, and it cannot be legally compelled to include other people's messages in its display if it chooses not to do so.

In general, a government may include religious symbols in its own holiday displays, but only if they are presented in a secular context, so that a court would not find that the government is endorsing or sponsoring religion.

II. FIRST AMENDMENT OVERVIEW

The First Amendment to the United States constitution says,

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

The part of the Amendment about establishment of religion is often referred to as "the Establishment Clause." The part about free exercise of religion is called the "Free Exercise Clause," and the part about freedom of speech is called the "Free Speech clause."

Through the Fourteenth Amendment to the U.S. constitution, state governments and cities are, like the federal government, prohibited from violating the constitutional rights and privileges guaranteed to citizens. Like the U.S. constitution, the Colorado constitution protects freedom of speech¹ and the free exercise of religion.² The religious freedom provision of the Colorado constitution contains an additional clause, called the “Preference Clause,” which states, “Nor shall any preference be given by law to any religious denomination or mode of worship.”³

III. FREEDOM OF SPEECH

The Free Speech Clause often comes into play with regard to holiday displays when citizens want to either place their own displays on public property or compel the government to include certain items in government-sponsored displays.

A. Government-sponsored Displays on Public Property

When the government is the speaker, as long as it does not violate the federal or state constitutions, it can choose the content of its message, and the public cannot compel it to present alternative viewpoints. In other words, if a government puts up its own holiday display, it can choose what elements to put in that display and what to leave out. This principle was confirmed by the Tenth Circuit Court of Appeals (the circuit Colorado is in) in the case of *Wells v. City and County of Denver*, in which a woman sued the City and County of Denver for violating her free speech rights after the City and County denied her request to place a Winter Solstice sign within the holiday display on the steps of the City and County building.⁴

The *Wells* court looked at whether the display was government speech or private speech and to what extent the government could control the content of the display. The court first concluded that the display was government speech. It noted that the City of Denver put up, maintained and took down the display, and that it owned all the components of the display, although they were paid for with donations raised by a private foundation. The City also paid for and had complete control over the construction, message and placement of a sign in the display that thanked the sponsors of the display. The court also decided that a reasonable observer would think the display was the City’s speech rather than private speech.

Given that the display was government speech, the court then looked at the extent to which Denver could control the content of the display, and concluded that the City was “entitled to present a holiday message to its citizens without incurring a constitutional obligation to incorporate the message of any private party with something to say.”

B. Private, Unattended Displays on Public Property

The issue of whether private parties should be allowed to place unattended displays on public property is not part of the City’s Holiday Display Policy and is beyond the scope of what the Task Force is being asked to consider. However, staff thought that the Task Force might appreciate some information on this subject.

The City's streets, sidewalks and parks constitute a "traditional public forum" in which members of the public may engage in First Amendment activities. However, even on property that is considered a public forum for free speech purposes, a government can place "time, place or manner" restrictions on speech as long as such restrictions are *content-neutral*; that is, the restrictions cannot be based on the content of the message, and must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."⁵ Denver, for example, has traditionally had a ban on private, unattended displays being left on public property as a valid time, place or manner restriction on speech, and the *Wells* case upheld that ban as constitutional.

The City of Fort Collins has also traditionally not allowed private, unattended displays to be placed on City property, as part of holiday displays or otherwise, not only because of safety and aesthetic concerns, but also because the City is much less able to control the content of such displays, compared to the content of the City's own holiday display.

IV. THE ESTABLISHMENT CLAUSE AND GOVERNMENT-SPONSORED HOLIDAY DISPLAYS ON PUBLIC PROPERTY

A government may include religious symbols in its holiday displays if it chooses, but only if it does so in a way that does not violate the Establishment Clause. The way to do that is to ensure that the context and overall message of the display are secular. Unfortunately, there are no hard and fast rules about what a reviewing court would find to be acceptable or not. There are, however, a few guiding principles, based on U.S. Supreme Court case law, that make it less likely a court would find a display to be unconstitutional. This section provides a summary of the cases most relevant to holiday displays, and then notes the lessons to be learned from them.

A. The *Lemon* Test

To determine whether a government-sponsored program or activity violates the Establishment Clause, courts typically apply the "*Lemon* test," which is a three-part test created by the U. S. Supreme Court in the 1971 case *Lemon v. Kurtzman*.⁶

For a government-sponsored display, program or activity to withstand a challenge under the Establishment Clause, the *Lemon* test requires that (1) the display must have a secular purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) it must not foster an excessive entanglement with religion.

The U.S. Supreme Court considered the constitutionality of public holiday displays in two cases: *Lynch v. Donnelly*, a 1984 case involving a city-sponsored crèche displayed in a public park⁷, and *County of Allegheny v. American Civil Liberties Union*, a 1989 case challenging both a crèche in a county courthouse and a menorah outside a city and county building as violations of the Establishment Clause⁸. In both cases the Court deviated somewhat from the *Lemon* test and created some question as to what standards lower courts should apply to similar cases in the future.

B. Lynch v. Donnelly

The City of Pawtucket, RI's display in *Lynch* included not just a crèche, but also many "secular" symbols of the holiday season including a Christmas tree, a Santa Claus house, a talking wishing well, a banner reading "Seasons Greetings," and cut-out figures of a clown, an elephant, a robot and a teddy bear. The Court ruled 5-4 that the display of the crèche was constitutional, but the reasoning behind this ruling is not very clear. The Court said it was important to look at the crèche in the overall context of the holiday season, and the Court found all the elements of the *Lemon* test to be met, but it didn't establish clear standards for distinguishing between a display that would be permissible and one that would be an impermissible endorsement of religion. The Court's main consideration seemed to be that this display was no worse than other examples of government religious involvement in other contexts that the Court had previously found to be constitutional. The Court did conclude that the overall message of the display, given all its elements, was not a religious one, and that any benefit to one faith or religion, or to religion in general, was indirect, remote and incidental.

Justice O'Connor wrote a concurring opinion in *Lynch* that provided a bit more of a framework for decision making. She stated that it "has never been entirely clear" how the three parts of the *Lemon* test relate to the principles of the Establishment Clause, and that it was helpful to focus on two concepts: (1) excessive government entanglement with religion and (2) whether Pawtucket had "endorsed" Christianity or disapproved other non-Christian religions, based on both its intended communication and what people might actually perceive the message to be. She stated that any "endorsement" of religion by the government is impermissible, but that a display of religious symbols on public property is constitutionally O.K. as long as a "reasonable observer" viewing the display in its overall context, in this case, the holiday season, would not perceive a message of governmental endorsement or sponsorship of religion.

C. Allegheny County v. ACLU

In *Allegheny*, the Court considered an Establishment Clause challenge to two displays: one was a crèche located inside the county courthouse, which included a banner reading, "Gloria in Excelsis Deo," some potted poinsettias and two small evergreen trees. The other display was located outside the city-county building, and consisted of a 45-foot Christmas tree decorated with lights and ornaments accompanied by a sign with a message about liberty and freedom, and an 18-foot menorah. The menorah was the only portion of the second display that was challenged as violating the Establishment Clause.

The Court in *Allegheny* looked back at the reasoning in the *Lynch* case, including Justice O'Connor's opinion, and ruled 5-4 that the crèche display was unconstitutional because, unlike in *Lynch*, nothing detracted from the religious message of the crèche: the flowers and greenery were not equivalent to the secular seasonal symbols in *Lynch*, and a sign that stated the display was owned by a Roman Catholic organization demonstrated that the government was choosing to endorse that organization's religious message rather than communicating a message of its own. The Court went on to say that the government can acknowledge and celebrate Christmas in

some manner as a cultural phenomenon, but it cannot observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.

As for the menorah, the Court noted that while the menorah is a religious symbol, its message is not exclusively religious, and it has become the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions. Here, the menorah's placement with the tree and sign created an overall holiday setting that represented two holidays, not one. The Court noted that the city would violate the Establishment Clause if it were celebrating both holidays as religious holidays, but that if it celebrated them both as secular holidays, there would be no constitutional violation.

The Court concluded that the display's Christmas tree, as the predominant element of the display and the "preeminent secular symbol of the Christmas season," served to emphasize the secular aspect of the message communicated by the other elements of the display, including the menorah, making the menorah "simply a recognition that Christmas is not the only traditional way of observing the winter holiday season." The Court also said it was reasonable to consider the fact that there are not really any alternative, secular symbols of Chanukah in determining whether the government meant to promote a religious faith. Finally, the court felt that the sign, with its message regarding liberty, freedom and light, increased the likelihood that the tree and menorah would be interpreted as a recognition of cultural diversity rather than an endorsement of Christianity and Judaism. Given all these factors, the court ruled it was not sufficiently likely that a "reasonable observer" would perceive the combined display as an endorsement or disapproval of his or her particular religious choice.

D. Lessons Learned from Lynch and Allegheny.

Justice O'Connor, in her concurring opinion in *Lynch*, said, "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." Since *Lynch* and *Allegheny*, lower federal courts attempting to apply the reasoning of those cases to evaluate other holiday displays have variously found crosses, crèches and menorahs displayed on public property, alone or with other, secular symbols, to be constitutional or unconstitutional depending on the circumstances, the context in which they are displayed, and each court's interpretation of the Supreme Court's rulings.

As the Supreme Court said in *Lemon*, the Establishment Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." However, the holdings in *Lynch* and *Allegheny* suggest a few principles that could be helpful in evaluating a holiday display on public property:

- (1) A display consisting of only a religious symbol or symbols is more likely to be found to violate the Establishment Clause than a display that mixes religious and secular symbols. A display of all secular symbols does not raise Establishment Clause issues.
- (2) Symbols such as Santa Claus, Christmas trees and reindeer are considered secular by the courts even though they are associated with Christmas, which has religious as well as secular aspects.

- (3) Written messages matter. As part of a display, a sign with a religious holiday message makes it more likely the display will be seen as endorsing religion than a sign with a seasonal or other non-religious message.
- (4) The courts will likely look at whether a “reasonable observer” would consider the display to be endorsing or promoting religion, not just whether the government intended it to, or whether a complaining party perceives in that way. But it is hard to predict how a court would determine that reasonable observer’s perception, and how the perception is affected by the reasonable observer’s presumed knowledge or experience.

V. COLORADO’S PREFERENCE CLAUSE

As mentioned above, the Colorado constitution has a clause prohibiting government from giving preference by law to any religious denomination or mode of worship. There is only one Colorado case, *Conrad v. Denver*⁹, interpreting this provision. In that case, the Colorado Supreme Court reasoned that the Preference Clause is an “embodiment” of the Establishment Clause, and so applied the *Lemon* test to the issue, as well as relying heavily on the U.S. Supreme Court’s reasoning in *Lynch*. Under that analysis, the Court concluded that a nativity scene included in the City and County of Denver’s display (the only religious symbol in the display) did not violate the Preference Clause where the purpose of the overall display was secular, the primary effect of the display was not to advance religion, and there was no evidence of extensive government entanglement with religion.

The *Conrad* court did note that, in addition to considering the federal law construing the Establishment Clause, the “text and purpose” of the state constitutional provision must also be considered, saying, “It follows that under certain circumstances we could find a violation of the Preference Clause where, under the same or similar factual circumstances, the United States Supreme Court had declined to find a violation of the Establishment Clause... However, such a course of conduct should not be undertaken lightly.” Unfortunately, this provides little guidance as to the particular kind of display that the current Colorado Supreme Court might find impermissible under the Preference Clause.

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¹ Colorado Constitution Article II Sec. 10.

² Colorado Constitution, Article II. Sec. 4.

³ *Id.*

⁴ *Wells v. City and County of Denver*, 257 F.3d 1132 (2001).

⁵ *Id.*

⁶ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁷ *Lynch v. Donnelly*, 465 U.S. 668 (1984)

⁸ *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989).

⁹ *Conrad v. Denver*, 724 P.2d 1309 (1986).